vss

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1002 OF 2002

Barku Mahadu Ghute
r/o. Saharepada, Waghivali
Tal.:Sahapur, Dist.:Thane
(At present lodged at
Yervada Prison, Pune) ... Appellant

V/s.

The State of Maharashtra
(through Padagha Police Station) ... Respondent

None for Appellant
Mrs.P.H. Kantharia, APP, for Respondent

CORAM: **V.G. PALSHIKAR, Ag. C.J. & SMT.NISHITA MHATRE, J.**

DATED: **AUGUST 22, 2006**

ORAL JUDGMENT (PER SHRI PALSHIKAR, Act.C.J.):

. Being aggrieved by the judgment and order of the conviction recorded by II Adhoc Additional Sessions Judge, Thane in Sessions Case No.341 of 2001, the Appellant has preferred this appeal though jail. Since the accused was duly represented in the appeal, the matter was called out. Inspite of the fact that the matter was on Board, none appeared yesterday. Therefore, it was kept today. When called out today also nobody appears. In such circumstances, we have no alternative but to consider the appeal on merits. With the assistance of the learned Assistant Public Prosecutor, we have gone through the record and we proceed to decide the appeal on merits.

2. The prosecution case stated briefly is that the

complainant Sayvan, PW1 lodged a complaint in the police station showing that his father has assaulted his mother. This First Information Report, according to the complainant himself, was lodged naming the accused on suspension. The incident occurred in the night of 12th and 13th April, 2001. The accused was in the house with his wife and grandson Sagar. According to the prosecution, at about past midnight the accused assaulted the victim and left the place. The grandson when woke up found the grandmother lying in an injured state and breathing very slowly. He, therefore, raised shouts for help. The neighbours came and reported the matter to the son of the victim and the accused who came to the spot, took the mother to the hospital where she was pronounced dead. Therefore, the sentence earlier registered under section 326 was converted to section 302 of the Indian Penal Code. During investigation the accused was arrested. The investigation was completed and chargesheet was filed. The accused was charged for having caused intentional death of his wife Banshibai. The prosecution examined in all 11 witnesses to prove its case. The trial Judge on appreciation of this evidence came to the conclusion of the guilt and consistent with that conclusion, sentenced the accused to suffer imprisonment for life which judgement and order of conviction and sentence is impugned in this Appeal as aforesaid.

3. PW1 Sayvan is the son of the accused who at the

time of occurrence of the offence was away in another village where he was informed at around 4 am that his mother has been assaulted. He therefore, went to the place where his mother was residing, took to hospital where she breathed her last. He has deposed to the circumstances which he saw. After he reached the spot the accused was not present there. The mother was unconscious and, therefore, nobody could have told him as to who caused the injuries to the mother. He had heard earlier of the quarrels between the two and therefore, he expressed his suspicion that the father must have done it. It is obvious from the deposition of this witness that he is not an eye witness who was having no knowledge as to who exactly assaulted his his mother and has candidly admitted in his crossexamination that he named his father in the First Information Report solely because of suspicion.

4. PW2 is the sister of the victim who has turned hostile. No reliance can therefore, be placed on anything said by her though factually during her crossexamination by the Additional Public Prosecutor nothing is elicited which can be used against the accused.

5. PW3 is the wife of PW1 i.e., brother in law of the accused and the victim. She has deposed more or less in the same tenor as her husband PW1. They came to know of the assault and therefore, went to the village,

found the victim lying in an injured state and in a position where she was unable to speak. This witness has further deposed that she told her grandson Sagar that the assault was committed by the accused. She has also deposed that the victim while being carried to the hospital, told her by signs that she has been assaulted by the accused. She has not deposed what the signs were from which she could deduce that the assault was by the accused. She also obviously is not an eye witness nor anything incriminating is deposed to by her.

6. PW4 is the sole eye witness Sagar, son of PW1 and grandson of the accused and the victim who has deposed that he was with his grandmother sleeping with his grandmother. In his examination he asserts that he personally witnessed his grandfather killing the grandmother with axe. He then raised shouts upon which according to the witness the accused ran away. He also identified the axe allegedly used by the accused. However, his crossexamination is very revealing and child as he was then he has very clearly admitted that he has been tutored by his father. His deposition to this extent deserves to be considered in the verbatim:

> "... It is true that when I woke up in the morning, I witnessed my grand-mother lying in injured condition beside me. It is true that thereafter, I started weeping. I do not know names of the neighbours who gathered in our house. After sometime, my father and mother also came there. They shifted my grand-mother in hospital. I do not know as to what happened thereafter. It is true that I have been tutored to depose in the court that my grand-father

killed my grand-mother with an axe."

From the above it is very obvious that the deposition of this witness is absolutely of no consequence. He has deposed that he was tutored to depose and consequently he cannot be called an eye witness to the incident.

7. He has also admitted that he found his grandmother lying in an injured condition besides him when he woke up in the morning. So there is no evidence on record to establish presence of the accused at the scene of offence, around the time of offence. There is no other evidence which puts the accused at or around the place of evidence.

PW5, Ghanshyam Hari Agivale was a friend of the family. He has deposed that the accused, his wife and grandson Sagar were staying together. He also deposed to the fact that there used to be quarrels between the accused and Banshibai, the victim. He heard shouts of her on the date of the incident early in the morning and went to the house where he saw Banshibai has sustained bleeding injuries on her chin and neck and she was saying something by signs. Therefore, his brother in law went to Washim and informed PW5 about it. After sometime, they came and the victim was removed to the hospital. He has submitted that he does not know what happened thereafter. He had deposed to the effect that victim told him something by signs which he could not

know. The testimony of this witness is therefore of no use for the present purposes.

PW6, is Namdeo Sonu Bhavar. He knew the accused and the victim. He heard shouts of Sagar, PW4 and therefore rushed to the spot. He has very clearly stated that by the time he reached the house, the accused had fled away from the house. Nothing is stated by him as to how he deposed about the accused fleeing the scene of offence. That obviously is a surmise made by the witness. He has deposed to the effect that there used to be in past quarrels between the accused and the victim.

PW7 is Padu, who heard the shouts and went to call for PW1. He saw the accused lying at the place of occurrence. He deposed about the quarrel between the accused and the victim and very categorically admits in his crossexamination that he did not personally witness anybody assaulting Banshibai the victim.

PW8 is the Doctor who conducted he postmortem examination. He has deposed that the death was caused due to the wounds which he found on the body. He therefore, proves that the death occurred due to the injury caused by weapon. His testimony is liable to be accepted and consequently all that has been proved by the prosecution is the fact that Banshibai met unnatural death.

PW9 is the police inspector who at the relevant time was posted as Additional Police Inspector at Padagha, when the First Information Report was lodged by the PW1. He has investigated the complaint and recorded statements of several persons. The accused was traced out by him in the adjacent forest on 15.4.2001 and was thereafter arrested. The axe was ceased as will be seen from the scene of the offence. PW7 has deposed that when he saw Banshibai lying in the injured state, he also saw the accused lying thereby. Yet according to this police inspector, on 21.4.2001, the accused discovered the axe by which he killed his wife. Therefore, panchanama was prepared. This obviously, appears to be an error committed by the police official. According to the witnesses, the weapon of offence was lying at the site. There was therefore, no question of effecting the recovery or discovery 9 days after the occurrence of the offence.

In such circumstances, the recovery of the axe as alleged by this Inspector becomes doubtful and cannot be relied upon. Even assuming that the recovery was made as deposed to by this Inspector, the blood analysis of the blood found on the axe was inconclusive. It did not show any blood which could match with the blood of the accused.

PW10 is a Panch witness. He is a witness to the recovery of axe at the instance of the accused which

according to the witness was concealed by the accused under a heap of roof tiles. Again, the evidence of this witness becomes doubtful as according to two other witnesses, the axe was lying at the scene of offence when they visited the site immediately after hearing the shouts of Sagar.

PW11, Baban is also a panch witness to the recovery. For the same reasons his evidence also is of no consequence.

8. It will therefore be seen that except for an uncorroborated testimony of an 8 years old child, there is nothing which could connect the accused with the crime. Two witnesses have deposed at the accused that they inferred that the accused was the assailant because of some signs made by the victim. What those signs were is not stated. The evidence of recovery of the axe is also not acceptable for the reason that two other witnesses who visited the site of offence immediately on hearing shouts of Sagar deposed that the axe was lying there. Apart from that, even if the evidence of recovery of axe is accepted there is nothing which can connect the accused to the axe. His blood was not analysed. It was not matched with the blood found and finger prints were not taken which could have thrown some light on the axe handling of the accused. The learned trial Judge has in effect relied on the uncorroborated testimony of child witness and by placing

such reliance and accepting such evidence, he has considered the judgment of the Supreme Court in those regard. That judgment speaks only of acceptability of child witness's deposition. It cannot be used to say that the evidence of Sagar in this case is liable to be accepted even though he admits in his crossexamination that he was tutored to state in Court that he saw the accused committing assault on the victim. It was therefore, an error of law on the part of the learned trial Judge to order conviction of the accused on such scanty material without taking into consideration. The lapses on the part of the prosecution and contradictory statements recording existence of the facts at the scene of offence and its recovery. In our opinion, the judgment of the conviction is wholly unsustainable in law and is liable to be set aside.

9. In the result, therefore, the Appeal succeeds and is allowed. The accused is acquitted of the offence with which he was charged. He is in jail. He is liable to be released immediately, if not otherwise required in law.